United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-6129

United States Court of Appeals

FOR THE SECOND CIRCUIT

B P/S

RONALD H. WHELAN, JOHN J. BRODERICK, EDWARD J. BURNS, EDWARD J. GASPARTICH, WILLIAM F. LYNCH, ANTHONY J. ROSS, HENRY O. HANRAHAN, RICHARD LIETO, FRANCIS B. MCCOMB, FRANK B. JONES, BENEDETTO RUNCO, GEORGE S. BRITO, JOHN E. CONDON, JOHN E. HARKINS, JOHN B. JONES, WILLIAM F. KEHOE, RICHARD D. LANG, TIMOTEO MONGE, WALTER R. PRICE, ALFRED J. SEEVERS, GUNNAR O. STRAND, JOHN A. MUELLER, MARC LANG, BENEDETTO LEO, HARATIO N. AGGARD, JOHN S. FORTE, ERICH GEHM, JOSEPH G. GLENNON, CONSTANTINO L. LECNE, SABATO A. MESSINA, FRANK J. MONDELLO, HENRY G. NIELSEN, HAROLD M. OLIVER, SIMON R. ROSENTHAL, JOSEPH J. SCHULTZ, JOHN R. SHARPE, THOMAS SOLOMETO, JR., ANTONIO SPINELLI, MARIO RUNCO, FREDERICK H. MALLETT, ROBERT M. DEGARLAND, HENRY BUTLER, HERMAN SEIBEL, JAMES MULVANEY, and RICHARD DARE,

Plaintiffs-Appellants,

—against—

CLAUDE S. BRINEGAR, Secretary of the Department of Transportation, ADMIRAL CHESTER R. BENDER, Commandant of the U. S. Coast Guard, and ROBERT E. HAMPTON, JAYNE SPAIN and L. J. ANDOLSEK, constituting the members of the U. S. Civil Service Commission,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLANTS

MARKOWITZ & GLANSTEIN
Attorneys for Plaintiffs-Appellants
50 Broadway
New York, N.Y. 10004
943-6148

Of Counsel,
JOEL C. GLANSTEIN
ELEANOR GLANSTEIN

INDEX

United States Court of Appeals

FOR THE SECOND CIRCUIT

75-6129

RONALD H. WHELAN, JOHN J. BRODERICK, EDWARD J. BURNS, EDWARD J. GASPARTICH, WILLIAM F. LYNCH, ANTHONY J. ROSS, HENRY O. HANRAHAN, RICHARD LIETO, FRANCIS B. MCCOMB, FRANK B. JONES, BENEDETTO RUNCO, GEORGE S. BRITO, JOHN E. CONDON, JOHN E. HARKINS, JOHN B. JONES, WILLIAM F. KEHOE, RICHARD D. LANG, TIMOTEO MONGE, WALTER R. PRICE, ALFRED J. SEEVERS, GUNNAR O. STRAND, JOHN A. MUELLER, MARC LANG, BENEDETTO LEO, HARATIO N. AGGARD, JOHN S. FORTE, ERICH GEHM, JOSEPH G. GLENNON, CONSTANTINO L. LEONE, SABATO A. MESSINA, FRANK J. MONDELLO, HENRY G. NIELSEN, HAROLD M. OLIVER, SIMON R. ROSENTHAL, JOSEPH J. SCHULTZ, JOHN R. SHARPE, THOMAS SOLOMETO, JR., ANTONIO SPINELLI, MARIO RUNCO, FREDERICK H. MALLETT, ROBERT M. DEGARLAND, HENRY BUTLER, HERMAN SEIBEL, JAMES MULVANEY, and RICHARD DARE,

Plaintiffs-Appellants,

—against—

CHARLES S. BRINEGAR, Secretary of the Department of Transportation, ADMIRAL CHESTER R. BENDER, Commandant of the U.S. Coast Guard, and ROBERT E. HAMPTON, JAYNE SPAIN and L. J. ANDOLSEK, constituting the members of the U.S. Civil Service Commission,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLANTS

Questions Presented

1. Whether the Treasury Board determination of 1966 which resulted in appellants being paid on a parity with Staten Island Ferry employees pursuant to what is now 5 U.S.C. §5348(a)* remained in effect until superseded by the Department of Transportation (hereinafter "DOT") in a procedurally lawful manner?

2. Whether the appellants who serve as officers and crew members on the Governors Island Ferry were given valid notice of any intended change by DOT in the method to be utilized in fixing the appellants' wage scales pursuant to 5 U.S.C. §5348(a)?

3. Was there a valid basis utilized by the Department of Transportation in changing the method of determining the wages of the appellants who served on the Governors Island Ferry?

4. Did the Civil Service Commission abuse its discretion and act in an arbitrary and capricious manner in refusing to follow the recommendation of DOT that the appellants serving as vessel officers and crew members of the Governors Island Ferry should be allowed an exception to the 5.5 per cent limit on wages imposed by Executive Order 11639 for the 1972 and 1973 fiscal year?

---

* U.S.C. §5348(a) provides in pertinent part as follows:
"(a) . . . the pay of officers and members of crews of vessels excepted from chapter 51 of this title by section 5102 (c)(8) of this title shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates and practices in the maritime industry."

Statement of the Case

This case involves an appeal by the plaintiffs-appellants, officers and crew employed on the Governors Island, New York Ferry, from the denial by the United States District Court, Southern District of New York of appellants' claims for back wages from July 1967 to August 1968 and July 1970 to the present time and a pay adjustment for the future. The respondent-appellees are Claude S. Brinegar, Secretary of the Department of Transportation, Admiral Chester R. Bender, Commandant of the United States Coast Guard and Robert E. Hampton, Jayne Spain and C. J. Andolsek, constituting the members of the United States Civil Service Commission.

In reaching the determination it did the District Court erroneously found that respondent DOT automatically had the right to change Treasury Department Wage Board order of March 1966 (246a-248a).* That order provided for the adjustment of the Governors Island Ferry employees wage rates by the same cents per hour increases in basic rates for comparable officers and crewmen classifications in the New York City Staten Island Ferry service.

In view of the concession of respondents-appellees' witness that any change by DOT in the Treasury Department order had to have some valid basis (147a), the District Court should have found that DOT was not free to change the Treasury Board order without following proper procedures concerning notice to the appellants.

The Court below further found that DOT had made a decision to replace the previous parity relationship govern-

* All references to pages in the Appendix to Appellants' Brief shall be in this form.

ing plaintiffs-appellants' wage increases based on the wages of Staten Island Ferry employees referred to in the Treasury Wage Board order with a survey to determine pay increases for the Governors Island Ferry employees, when in fact the record demonstrates that the Treasury Wage Board order had been readopted by DOT as late as March and June 1969. (250a-254a)

The Court also found that DOT had complied through the use of its survey with the statutory mandate under 5 U.S.C. §5348(a) which requires that federal maritime employees be paid at the prevailing wage rates and wage practices in the maritime industry in spite of evidence that there was no prevailing rate for the maritime industry in the New York harbor (326a) so the use of the survey method to determine wages would not satisfy the statutory mandate of §5348(a). If the change to the survey method would not help to determine a prevailing rate there was no valid basis for not continuing with the method adopted by the Treasury Department which reflects the other basic technique used to fix wage rates for federal maritime employees (237a).

Another basic error in the District Court's determination in this matter can be found in its failure to consider the abuse of discretion of the Civil Service Commission in refusing to defer to the Department of Transportation finding that the Governors Island Ferry employees met the requirements for an exception to the wage increase limit (186a) when the employer agency, DOT, and its analysis should have been decisive on this question.

The Complaint in this matter was filed in the United States District Court, Southern District of New York on

June 26, 1973, and appellees filed their Answer on October 19, 1973. The Court in its Opinion on appellants' motion to strike appellees' affirmative defenses found subject matter jurisdiction under 5 U.S.C. §5348(a), 28 U.S.C. §1331, 28 U.S.C. §1346(a)(2) and possibly 12 U.S.C. §1904 and 5 U.S.C. §702 (23a-25a). Plaintiffs-appellants sought in their Complaint back pay from July 1967 to August 1968 and from July 1970 to the present, and an adjustment in their pay rates for the future to place them in parity of increase with the Staten Island Ferry.

Following the denial of the appellees' motion for summary judgment, a trial was held on February 20, 1975. The Judgment and Order dismissing the Complaint against the appellees was rendered on November 3, 1975 by United States District Judge Charles Metzner (203a-210a). Appellants thereafter filed a timely notice of appeal from the order (3a).

Statement of Facts

The plaintiffs-appellants in this case are the officers and crewmen of the Governors Island Ferry. They are federal maritime employees and are required to have their wages fixed pursuant to 5 U.S.C. §5348(a).

The statute provides in pertinent part that:

> "(a) . . . the pay of officers and members of crews of vessels . . . shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates and practices in the maritime industry." (22a)

There are two methods for determining wages for federal maritime employees. One is to compare their activity

to a virtually identical one in the private sector. If there is no basis for a comparison, a wage survey can be conducted in that industry to provide a basis for setting the Federal employees wages (237a).

Until 1966 the first method of fixing appellants' wages was used by the Department of the Army which then had jurisdiction over Governors Island. Parity in payment to the appellants was maintained with the crews of the 69th Street, Brooklyn Ferry system operated by New York City. (246a-247a)

On June 1, 1966 the Coast Guard assumed control over Governors Island. Prior to June 1966, the 69th Street Brooklyn Ferry had gone out of business and no longer provided a basis for establishing the pay of the Governors Island Ferry employees. (247a)

As a result of a Treasury Department Wage Board determination the Staten Island Ferry, operated by the City of New York, was substituted as the source for determining the prevailing rates and practices in the maritime industry under 5 U.S.CC. §5348(a) to establish the basis of pay for the Governors Island Ferry employees. (246a-248a) On March 31, 1966 the Treasury Department Wage Board had authorized an increase to take effect July 1, 1966 in the base pay rates of the Governors Island Ferry employees equal to the increases in basic rates for comparable officers and crewmen classifications on the Staten Island Ferry. (246a-248a) The Wage Board also decided on a future policy of granting the same cents per hour increases for the Governors Island Ferry employees as was received by the Staten Island Ferry employees. (248a) This decision created parity with the Staten Island Ferry employees. (47a)

The decision of March 31, 1966 demonstrates a continuation of the use of the method of determining these federal maritime employees wages by comparing the Governors Island Ferry activity to a virtually identical activity in the private sector, the Staten Island Ferry.

The Wage Board found that the current prevailing rates in the New York Harbor area were the City of New York Staten Island Ferry rates. (247a) Thus the use of the Staten Island Ferry as the source for the determination of the Governors Island Ferry wage rates continued to meet the statutory mandate under 5 U.S.C. §5348(a). (247a)

On October 15, 1966 jurisdiction over the Coast Guard, including the Governors Island Ferry operation was transferred from the Department of the Treasury to the newly created DOT.

In 1968, as a result of a wage increase which had been granted to Staten Island Ferry employees by the City of New York, the Governors Island Ferry employees sought an increase in their wages. (191a) The Coast Guard granted an interim 8½% pay increase retroactive to August 25, 1968 (52a) on February 19, 1969 . In December 1969 an agreement was reached that gave the plaintiffs the balance to comprise a 25 percent increase over pre-1967 wages. Parity with Staten Island Ferry employees was again achieved as of August 28, 1968. However, no parity of increase was granted for the 14 month period from July 1, 1967 till August 28, 1968 the date to which the 1969 agreement was made retroactive. (50a-54a) (242a)

The record reveals that the Coast Guard was readopting the Treasury Department's Wage Board decision through its retroactive wage increases which once again put the

Governors Island Ferry employees in the position of parity of increase with the Staten Island Ferry employees. (251a-254a) The plaintiffs' claim, in part, seeks back pay for the 14 month period of July 1, 1967 through August 28, 1968 when they did not receive this retroactive increase. (10a)

The next period involving the appellants' claims commenced on March 8, 1971 when Joseph O'Hare, President of Local 333, United Marine Division, representing the Governors Island Ferry employees, requested a meeting to negotiate a new wage agreement. His letter sought a 53 percent increase in wages over a three year period and was based on the settlement of a new contract effective July 1, 1970 which granted a 40 percent increase in wages to employees on the Staten Island Ferry boats. (64a)

Despite repeated requests by appellants' representatives (242a) a meeting was not held with the Coast Guard to discuss a wage increase until February 1972. At that time no agreement could be reached because on August 15, 1971 Executive Order 11615 was issued pursuant to the Economic Stabilization Act of 1970 (12 U.S.C. §1904) which established a temporary freeze on all wage increases. (20a)

The delay on the part of DOT in not conducting a wage review pursuant to 5 U.S.C. §5348(a) from October 1969 through August 15, 1971 and then not meeting with plaintiffs-appellants until February 1972 resulted in these employees being subjected to the wage freeze. As a result they were limited to a 5.5% increase in wages unless they could obtain an exception from the Civil Service Commission. (238a-239a)

Executive Order 11639 issued on January 11, 1972 gave authority to the Civil Service Commission to establish

maximum pay increase ceilings for federal employees. A 5.5 percent limit was put on any increase. However, if the following three conditions were met, exceptions to the 5.5 percent limit would be allowed:

> "1. that a tandem relationship exists between a Federal pay schedule for an employee unit and pay increases granted in an activity in the private sector.
>
> 2. the Pay Board has permitted a pay increase for the activity in the private sector which is in excess of the guidelines; and
>
> 3. a comparable increase is essential to the continued operation of the Government service concerned." (231a)

As an interim measure, in March 1972, DOT granted the Governors Island Ferry employees a 5.5 percent increase in accordance with the limits set by the wage freeze, while it requested the Civil Service Commission to exempt employees of the Governors Island Ferry and award them an 8.5 percent increase in addition to the 5.5 percent previously granted (233a-235a). DOT's June 10, 1972 request was denied by the Civil Service Commission on the ground that the three conditions specified in Executive Order 11639 (226a-231a) were not met.

DOT in May 1973 again sought an exception from the wage ceiling in order to grant an increase to 10.13 percent for the appellants. This recommendation was once again denied and the Governors Island employees were limited to a 5.5 percent increase. (217a-222a) This suit was commenced before the October 24, 1973 ruling that neither the first nor third conditions of Executive Order 11639 had been satisfied. (214a-215a)

The July 27, 1973 recommendation by DOT to the Civil Service Commission stating its reasons justifying an exception to the 5.5 percent limit for the ferry employees clearly indicates that DOT properly believed a tandem relationship existed between the Governors Island Ferry activity and the maritime industry in the New York Harbor. The record demonstrates support for this position. (221a) DOT, as the agency responsible for the continued operations of the Governors Island Ferry demonstrated its concern that a comparable increase in wages to that given the private sector in the New York Harbor was necessary to the continued operation of the ferry—another condition for the wage limit exception.

The Pay Board had already permitted an increase in excess of the established guidelines to the private sector activity with which the Federal activity has a tandem relationship. The New York Harbor maritime private sector labor contracts provided for a final 10% increase for the period April 1, 1972 to March 31, 1973 and the increase had been approved by the Pay Board (221a). Thus, all three requirements for the granting of an exception (213a) were, in the view of DOT, fulfilled.

DOT as the employing agency was the agency best able to determine the facts in this type of situation and to decide whether its ferry service will be affected if no exception to the wage limit was allowed or if its ferry service was in a tandem relationship with a group in the private sector. The Civil Service Commission should have deferred to DOT's expertise in this area and it was an abuse of discretion which the District Court failed to recognize in not following DOT's recommendation. (203a-209a)

Without relying on any precedent the Court below erroneously dismissed appellants' claims finding that DOT had no duty to adjust appellants' wages from July 1, 1967 to August 28, 1968 (206a) and from July 1970 to the present and that the Civil Service Commission was justified in finding that the exceptions sought by DOT for appellants in 1972 and 1973 should not be allowed. (206a-209a)

For the reasons stated herein plaintiffs-appellants will demonstrate that the order of the District Court should be reversed and the relief sought by appellants granted.

ARGUMENT

POINT I

The change by appellees in the method of determining appellants' wages was illegal and failed to fulfill procedural requirements.

A. ***The 1966 Treasury Wage Board determination which provided that salary increments for the Governors Island Ferry employees would equal whatever cents per hour increases were thereafter received for comparable Staten Island Ferry crews had to be superceded in a valid manner by the Department of Transportation.***

At the time the Department of Transportation assumed control over the Governors Island Ferry operation from the Treasury Department, a Treasury Wage Board determination was in effect which provided the method of fixing Governors Island Ferry employees salaries. In the legislation creating the Department of Transportation, a savings clause was included. Section 12 of the Public Law 89-670 (49 U.S.C. §1651) provided that:

"(a) All orders, determinations, rules, regulations, permits, contracts, certificates, licenses and privileges—

(1) which have been issued, made granted or allowed to become effective—

(A) under any provision of law amended by this Act or

(B) in the exercise of duties, powers or functions of which are transferred under this Act by

(i) any department or agency, any functions which are transferred by this Act or

(ii) any court of competent jurisdiction and

(2) which are in effect at the time this Act takes effect shall continue in effect according to their terms until modified, terminated, superceded, set aside or repealed by the Secretary, Administrative Board, or General Counsel in the exercise of any authority respectively vested in them by this Act, by any Court of competent jurisdiction or by operation of law."

In the discussion in the House of Representatives concerning the effect of the proposed Department of Transportation it was stated that:

"All orders, contracts, rules and regulations lawfully issued before the reorganization and all proceedings continue in effect after the reorganization until they have run their course or have been changed or terminated by appropriate procedures." 112 Cong. Rec. 20131 (1966)

From the House discussion and the savings clause as set forth, *supra*, it is clear that the Treasury Department Wage

Board decision could not be superceded without "appropriate procedures". The appellees' main witness, William Wesp, retired Chief of the Personnel Policy Division, Department of Transportation, conceded that: "there would be some reason, some thing" (147a) to show that a decision had been made to supercede the Treasury Department Wage Board decision with a new method of fixing wages for Governors Island Ferry employees.

The District Court erred in not finding that formal notice and formal publication procedures should have been followed by DOT, if it intended to supercede the Treasury Wage Board decision, previously applied to appellants in fixing their wages.

The notice and publication requirements in the Administrative Procedure Act (hereinafter APA) were made applicable to DOT by 49 U.S.C. §1655(h) which states:

> "The provisions of subchapter II of Chapter 5 (Administrative Procedure) and of Chapter 7 of Title 5 (Judicial Review) shall be applicable to proceedings by . . . (DOT) and any of the administrations or boards within the Department . . ."

The House of Representatives discussion of the proposed DOT indicates a deep and abiding concern for all procedural safeguards. This concern is reflected as follows:

> ". . . There is no loss or diminution of procedural safeguards, and all permissible channels for administrative or judicial proceedings are kept unimpeded. Statutory requirements relating to notice, hearings, acting upon the record, or administrative review, apply to the new Department . . ." 112 Cong. Rec. 20131 (1966)

The appellees failed to recognize that any change in the 1966 Treasury Wage Board determination had to take these requirements into account. This failure constitutes reversible error.

B. *The District Court erred in not finding that the Treasury Wage Board decision regarding the wages of the ferry employees comes within the definition of "rules" under Administrative Procedure Act and the appellants were entitled to, but did not receive, all the procedural safeguards that such rule making entails.*

The definitions of "rule" and "rule making" under 5 U.S.C. §551 state in part that:

> (4) "rule" means the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and *includes the approval or prescription for the future of rates, wages* . . . or practices bearing on any of the foregoing; (emphasis added)
>
> (5) "rule making" means agency process for formulating, amending or repealing a rule;

The Treasury Wage Board determination concerning the wages of the Ferry employees comes within the above definitions, and any change that DOT wanted to institute in that policy was subject to the notice and publication requirements of 5 U.S.C. §552, 553 of the APA. The Court below ignored these requirements.

At first blush it might appear that 5 U.S.C. §552(b)(a) which states that . . . matters that are—

> (a) "related solely to the internal personnel rules and practices of an agency; are exempt from the public

> information requirements that are imposed on agency rules, opinions, orders, records and proceedings"

applies in this case. However, legislative history of §552(b)(2) and case law indicate that the Treasury Wage Board determination concerning wages and any subsequent DOT decision superceding it would not come within the exception of §552(b)(2) and must meet all the requirements of the statute.

Senate Bill 1160 which passed the Senate on October 13, 1965 was accompanied by a Judiciary Committee report that interpreted exemption (2) as follows:

> "Exemption No. 2 relates only to the internal personnel rules and practices of an agency. Examples of those may be rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave and the like." Senate Report 8.

This excerpt from the Senate Report is quoted in several cases all of which conclude that the Senate Report best reflects the legislative intent surrounding exemption No. 2 that the exemption was to be relatively narrow in scope. *Benson* v. *General Services Administration,* 289 F. Supp. 590, 595 (W.D.Wash. 1968), affirmed on other grounds, 415 F.2d 878 (9th Cir. 1969); *Consumer's Union of United States* v. *Veteran's Administration,* 301 F. Supp. 796, 801 (S.D.N.Y. 1969); *Hawkes* v. *Internal Revenue Service,* 467 F.2d 787, 796 (6th Cir. 1972).

Other cases interpreting what should be included under the exemption for internal personnel rules and practices of an agency narrow the exemption still further by limiting it to "intra-agency housekeeping rules such as those related

to parking, regulation of lunch hours, sick leave policy, work schedules and office assignments". *Vaughn* v. *Rosen*, 383 F. Supp. 1049 (D.C.D.C. 1974). Another case added parking facilities to the definition of what constitutes internal personnel rules. *Stokes* v. *Hodgson*, 347 F. Supp. 1371 (D.C. Ga. 1972), affirmed *sub nom. Stokes* v. *Brennan*, 476 F.2d 699 (5th Cir. 1973).

Wages are not mentioned in any case interpreting the meaning of internal personnel rules. They are obviously too important a topic to come within the exemption and would not be considered a matter "related *solely* to the internal personnel rules and practices of an agency." (emphasis added), 5 U.S.C. (b)(2). Internal "housekeeping rules" are related to the every day details of personnel administration during the work day, not with a subject as significant as wages which in this case must be fixed and adjusted in accordance with the statutory mandate of 5 U.S.C. §5348.

Thus the Treasury Wage Board determination does not fall within the exemption to the public information statute and DOT was required to comply with all the requirements of 5 U.S.C. §552 before it could supercede that decision with a new method of determining wages.

In addition, DOT did not comply with 5 U.S.C. §553 requirements concerning rule making. Here too, the exemption to the notice requirements for proposed rule making deals with "a matter relating to agency management or personnel . . ." 5 U.S.C. §553(a)(2). While there is scant case law interpreting this provision there is no reason not to analogize this to the interpretation given to the exemption for internal personnel rules and practices of an agency

under §552(b)(2). The definition of the terms under that provision would only appear to include "housekeeping rules" and wages which are required to be fixed and adjusted according to statutory mandate go beyond mere "housekeeping rules".

Any attempt by DOT to supercede the Treasury Wage Board decision with a method of its own is an attempt to fulfill a statutory mandate to insure that the crews of vessels are paid "in accordance with prevailing rates and practices in the maritime industry" and cannot be regarded as just a matter related to agency management or personnel. Thus, the District Court erred in not finding that the "rule making" engaged in by DOT should have been formally pronounced or published.

POINT II

Assuming, *arguendo*, that DOT had followed proper procedure in changing from the use of the Staten Island Ferry wage schedule as the standard for setting Governors Island Ferry employees rates, there was no valid reason for that change.

If the use of the survey method could not better meet the statutory requirements of 5 U.S.C. §5348, there would be no logical reason to change the Treasury Wage Board's method and it would be arbitrary to do so. The Treasury Department concluded that the Staten Island Ferry constituted a sufficiently identical activity to recommend its use as the standard for setting Governors Island Ferry employee wages (237a, 246a-248a). It was found by the Treasury Wage Board that the Staten Island Ferry rates reflected the prevailing rates for the maritime industry

(47a). While the Board did not recommend the adoption of the exact rates paid Staten Island Ferry employees those rates were used as the standard for establishing the Governors Island Ferry employee wage rates. The Treasury Wage Board recognized that there were some differences between the Governors Island Ferry and the Staten Island Ferry (247a) but concluded they were identical enough to warrant the use of the comparison. It can be concluded from the Treasury Department report that use of the Staten Island Ferry schedule as the reference point for the setting of Governors Island Ferry rates of pay was the most appropriate method of fulfilling the statutory mandate of 5 U.S.C. §5348. (247a-248a)

Thus any change by DOT of the Treasury Department's procedure in order to be valid would have to better fulfill the statutory mandate to adjust wages: "... as nearly as is consistent with the public interest in accordance with prevailing rates and practices in the maritime industry". 5 U.S.C. §5348

The switch to the use of a wage survey, which is just "an attempt to obtain rates paid by selected employers in the area for similar occupations" (238a) appears to have resulted from the inability of civilian personnel at Governors Island working with the Personnel Policy Division to understand "what kind of an adjustment was going into effect with the Staten Island Ferry" (159a).

Apparently these personnel employees did not understand the contract that the Staten Island Ferry employees had entered into with New York City and were having difficulty in applying the cents per hour increase formula (158a-159a). That, according to the appellees' witness William Wesp, is the reason that a request was introduced

to do an informal wage survey. As William Wesp, the appellees' witness, stated at the trial:

> "But since they did not feel that they could continue with this cents per hour increase formula, in other words, it was not the nice patsy it was outlined to be, they wanted to look around and see what else they could find in the area." (159a-160a)

The convenience of personnel employees is not adequate reason for changing a policy of setting wages that had proved satisfactory. Would the use of a survey method better enable DOT to fulfill its statutory mandate to determine the prevailing rates and practices in the maritime industry?

In a letter dated August 18, 1969 P. E. Trimble, Acting Commandant, U.S. Coast Guard stated that the use of the survey method had been unable to establish a prevailing rate for the maritime industry and found there was no prevailing rate. (326a)

Thus, the method of surveying selected employer's rates for similar occupations in the maritime industry did not enable the Coast Guard to comply with 5 U.S.C. §5348 which calls for the use of "prevailing rates and practices" as a reference point for the fixing of wages.

The Staten Island Ferry schedule used by the Treasury Department met the necessary "prevailing rate" comparison, and as the survey method did not there was no valid reason for the change.

A further example of the arbitrary nature of respondents' survey methods is shown from the fact that from the retroactive pay adjustments granted in 1969 until the

spring of 1972 nothing was done to fulfill the mandate of 5 U.S.C. §5348(a). For a period of two years nothing was done to conduct a survey or to adjust wages in spite of the fact that increases were granted in the private sector of the maritime industry. (56a-58a) (160a-161a) Appellants were first harmed by this delay in that the private sector received a 20% increase in 1970 and a 10% increase in 1971 (242a) and appellants received no wage adjustment for the entire two year period. Appellants were further harmed because of the signing in the interim in August 1971 of Executive Order 11615 freezing wages (160a-161a). A continuance of the Treasury Board procedure would have assured plaintiffs the parity rate of increase with the Staten Island Ferry rates under its new contract starting in July 1970.

Thus there was no valid basis for the adoption of the survey method of determining wages and appellants were harmed by the change.

The determination of the Court below was erroneous in not finding that the 1966 Treasury Wage Board determination was never superceded in a legally sufficient manner by the Department of Transportation. It should be reversed and back pay should be awarded to the appellants for the periods of July 1967 to August 1968 and from July 1970 to the present to place them in parity of increase with Staten Island Ferry Personnel.

POINT III

The Civil Service Commission's decision denying the Department of Transportation's application on behalf of the Governors Island Ferry employees for an exception from the 5.5 ceiling on wage increases in 1972 and 1973, as provided by Executive Order 11639, was arbitrary and capricious and an abuse of its discretion.

In March of 1971, the union representing the Governors Island Ferry employees requested an adjustment in their wages to keep them in parity with maritime employees on the New York City Ferryboats who had just signed a new contract giving them a 40% increase in wages over the life of their contract. (241a-244a), (289a-324a) Due to the lengthy delay in meeting with the employee representatives or in conducting any wage adjustment activity (160a-161a) (242a) the Governors Island employees were caught in the wage freeze instituted on August 15, 1971 by Executive Order 11615.

Exceptions to this wage limit could be obtained upon application to the Civil Service Commission as provided for in Executive Order 11639 which was effective on January 11, 1972 (231a).

DOT's 1972 and 1973 applications (221a-223a) (233a-235a) for an exception to the 5.5 ceiling on wages were both denied by the Civil Service Commission (214a-218a) (224a-230). The District Court erred in not finding that the Civil Service Commission abused its discretion and acted in an arbitrary and capricious manner in denying these requests for exceptions.

The statute authorizing Executive Order 11639 states in part:

> "... no regulation of any agency exercising authority under this title shall be enjoined or set aside, in whole or in part, unless a final judgment determines that the issuance of such regulation was in excess of the agency's authority, was arbitrary or capricious or was otherwise unlawful under the criteria set forth in section 706(2) of title 5 United States Code." Public Law 92-210, §211(d), 85 Statutes 743 (1971).

The applicable section of 5 U.S.C. §706(2)(A) provides that a reviewing court shall:

> "(2) hold unlawful and set aside agency action, findings and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;".

The actions of the Civil Service Commission in denying DOT's request for an exception to the 5.5% wage ceiling come within this definition.

DOT as the employing agency was best able to determine the facts as to whether the Governors Island Ferry employees met the criteria for a wage exception.

The conditions for the exception set forth in Executive Order 11639, Section (b) were:

> (1) that a tandem relationship exist between a Federal pay schedule for an employee unit and pay increases granted in the private sector;
>
> (2) the Pay Board has permitted a pay increase for the activity in the private sector which is in excess of the guidelines; and

(3) a comparable increase is essential to the continued operation of the Government service concerned. (231a)

DOT in its applications concluded that the Governors Island Ferry employees met these criteria. DOT was in the best position to know all the relevant data and its recommendation should have been followed.

The recent trend of authority has been to find an abuse of discretion where one agency refuses to follow a recommendation already made by a sister agency. In the case of *Blaha* v. *The United States*, 511 F.2d 1165 (Ct. Cl. 1975) members of the National Maritime Union of America employed as unlicensed vessel employees of the National Oceanic and Atmospheric Administration, Department of Commerce brought a suit against the United States claiming that 5 U.S.C. §5348 required the Commerce Department to pay a wage increase that had been agreed to by the NMU, commercial operators and the Navy. The NMU claimed that the Secretary of Commerce had "abused his discretion in refusing to pay the prevailing wage rates in the form of a 'monthly leave supplement' ". The Court of Claims held "that the Secretary's action in refusing to pay such wage increases was an abuse of discretion and not justified by any public interest". 511 F.2d at 1165.

Here too, we are dealing with an effort by DOT to fulfill its statutory mandate under 5 U.S.C. §5348 to pay the Governors Island Ferry employees in accordance with the "prevailing rates and practices in the maritime industry". In its 1972 study (233a-235a), DOT found that the prevailing rate for maritime employees was 8.5% greater than

the 5.5% wage increase allowed by the wage freeze (235a), and decided an exception was in order to enable DOT to fulfill the statutory mandate of 5 U.S.C. §5348. Once again in 1973 DOT found that the Governors Island Ferry employees were being paid less than the "prevailing rate in the maritime industry and they requested an exception that would raise wages 10.13% over the 1972 rates". (221a-223a) The Civil Service Commission refused to comply with both findings (214a-218a, 224a-229a), despite the fact that at the time of the 1973 request the New York Harbor private sector labor contracts providing for a 10% increase for the period April 1, 1972 to March 31, 1973 had been approved under exceptions to wage and price control.

At the time of DOT's 1973 request, the Civil Service Commission had approved a 9.43% increase (retroactive to 1972) in the Harbor Boat Schedule issued by the Department of Defense. (222a) This approval was based on the finding of a tandem relationship with the increases granted New York tug boat employees. It was arbitrary and capricious for the Civil Service Commission to allow more than the 5.5% wage increase to 5 U.S.C. §5348 prevailing rate employees on the Harbor Boats and deny it to the Ferryboat employees, especially when the employer agency, DOT, recommended it. DOT was concerned because tug boat companies had been included in its survey and the approval of a tandem relationship increase for one government agency with maritime employees while denying it to Governors Island employees in the same wage area created a situation that appeared inequitable to its employees. (221a) This in turn could have an adverse effect on the continued operation of the Governors Island Ferry, the third requirement for exception from the 5.5% wage ceiling. (221a)

Between the two government agencies, DOT and the Civil Service Commission, DOT was the agency with the primary knowledge of the facts involved and the needs of the government on Governors Island. Its recommendation to the Civil Service Commission should have been followed.*

It has been held that conflict with determinations of other agencies is a factor to be considered in the review of agency determinations. *Blaha* v. *United States, supra,* citing *Farrell Lines, Inc.* v. *United States,* 499 F.2d 587, 601 (Ct. Cl. 1974). Here DOT had objectively concluded that the Governors Island Ferry employees met all the requirements for a wage exception under Executive Order 11639. DOT certainly could not be accused of trying to favor the appellants by their recommenda ion since DOT obviously did as it pleased regardless of the effect that it had on the Governors Island Ferry employees. Witness the fact that DOT had waited two years before conducting this 1972 survey which resulted in the plaintiffs being caught in the wage freeze in the first place. (160a-162a)

Thus DOT's determination that appellants fulfilled the criteria of Executive Order 11639 was based on an objective evaluation of the facts and was certainly not done to favor the appellants. The Civil Service Commission's rejection of DOT's findings brings it into conflict with a sister agency and must be closely scrutinized. The Court in *Blaha, supra,* pointed out that Congress in enacting 5 U.S.C. §5348 recog-

---

* Cf. *American Export Isbrandtsen Lines, Inc.* v. *United States,* 499 F.2d 552, 583 (Ct. Cl. 1974), in which the Court held that the Maritime Subsidy Board, Department of Commerce abused its discretion in refusing to include in allowable labor costs for subsidy purposes, "severance payments" that were agreed to in a collective bargaining agreement.

nized the unique character of the pay practices in the maritime industry. *Blaha, supra,* p. 1169. Therefore, the expertise that was developed by DOT in order to fulfill its statutory mandate of paying the plaintiffs "in accordance with prevailing rates and practices in the maritime industry" would make DOT knowledgeable enough to ascertain if the Governors Island Ferry was in a tandem relationship with an activity in the private sector. Also, DOT had sufficient expertise to determine that failure to grant an increase to the Ferry employees might have endangered the continued operation of the Governors Island Ferryboats a most essential Government service to the people on Governors Island.

Due to the unique character of the maritime industry as evidenced by the existence of a separate statutory section to determine the means by which the pay of officers and members of crews of government vessels is to be determined, the Civil Service Commission abused its discretion in not deferring to the greater expertise of DOT in this area.

CONCLUSION

The appellants in this case have been harmed by DOT's use of a wage survey method for determining their wages. This procedure was never adopted in a procedurally lawful manner and the change to the survey itself was arbitrary. It first resulted in a loss of wage parity for a 14 month period. The utilization of this procedure further harmed the plaintiffs in that the long delay in conducting any survey caught the plaintiffs in the wage freeze which in turn subjected them to a further loss of wages resulting from the Civil Service Commission's decisions. The Civil Service Commission's decisions denying DOT's requests for exceptions to Executive Order 11639 were arbitrary, capricious and an abuse of discretion.

For these reasons the order entered below should be reversed and the plaintiffs should be awarded back pay from July 1967 to August 1968 and from July 1970 to the present and an adjustment in their pay rates for the future to place them in parity with increases received by the Staten Island Ferry employees.

Respectfully submitted,

MARKOWITZ & GLANSTEIN
Attorneys for Plaintiffs-Appellants
Office and P. O. Address
50 Broadway, Suite 3100
New York, New York 10004
943-6148

Of Counsel,
JOEL C. GLANSTEIN
ELEANOR GLANSTEIN

Service of [illegible] (2) copies of the within
is admitted this 12th day of March 19 76

Robert B Fiske Jr

Steve

COPY RECEIVED

GROSBY-LODER PRESS, INC., 95 Morton St., New York, N. Y. 10014 BE 3-2336
(75-310—51321)